No. 05-611

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In the
Supreme Court of the United States

STATE OF NORTH DAKOTA and
STATE OF SOUTH DAKOTA,

Petitioners,

v.

US ARMY CORPS OF ENGINEERS, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

STATE OF MONTANA'S AMICUS BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MIKE MCGRATH
Attorney General of Montana
CANDACE F. WEST
Assistant Attorney General
State Bar ID No. 2639
Counsel of Record
State of Montana
Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

Mr. Wayne Stenehjem
Attorney General of North Dakota
State Capitol
600 East Boulevard Ave.
Dep't 125
Bismarck, ND 58505-0040

Mr. Larry Long
Attorney General of South Dakota
1302 East Highway 14, Ste 1
Pierre, SD 57501-8501

QUESTION PRESENTED

Whether the two-sentence dictum in *ETSI Pipeline*, giving navigation priority at the expense of other uses, should govern how Missouri River waters are allocated?

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INTEREST OF AMICUS CURIAE

From its source at the Three Forks in southwestern Montana to the North Dakota border, the Missouri River flows for more than 400 miles through Montana. Just west of the North Dakota border, the Missouri River's flows are captured by Fort Peck Dam, submerging 250,000 acres of land and storing up to 18.7 million acre-feet of water. Since Montana holds the headwaters of this invaluable natural resource and may suffer injury as a result of any errors in the management decisions regarding the river's reservoir system, Montana shares the interest of North Dakota and South Dakota, supports their petition, and urges the Court to grant the petition for certiorari in order to clarify whether the 1944 Flood Control Act requires the United States Army Corps of Engineers to manage the Missouri River reservoirs by giving navigation a priority at the expense of all other valuable upstream uses.

Attorney General Mike McGrath is the chief legal officer of the State of Montana and one of five members of the State Land Board which governs the use of 5.2 million acres of state-owned land. Mont. Const. art. X, § 4; Mont. Code Ann § 2-15-501 (2005). In his official capacity, the Attorney General has significant responsibility for management of trust resources within Montana and for representing the State of Montana in protecting Montana's resources in the interest of the citizens of the state. Under Montana law, the Attorney

General has the common-law authority to appear in actions affecting the public interest. *State ex rel. Olsen v. Public Serv. Comm'n*, 129 Mont. 101, 283 P. 2d 602, 603 (1955).

In Montana the United States Army Corps of Engineers operates the mainstem Missouri River reservoir at Fort Peck, and the State of Montana manages the water rights, the water quality, the wildlife and fisheries and their critical habitat at the reservoir. In its sovereign capacity the State of Montana has over the past decade brought actions on behalf of its citizens and visitors, participating in related cases in United States District Court challenging the operation of the Missouri River under the 1944 Flood Control Act for more than a decade. *State of Montana v. Kurt Ubbelohde, et al., (Civ. No. 02-70-Blg-RFC) (D. Mont. filed May 13, 2002)); State of South Dakota, et al. v. Needham [later Bornhoft], et al., (Civ. No. 91-26 JDS-BLG) (D. Mont. filed Feb. 4, 1991).*

Montana maintains a current and vital interest in the management of the Missouri River system in a manner that applies the extensive experience of the Corps of Engineers, and provides for an equitable balancing of the uses of the river. The State of Montana supports the petition for writ of certiorari because Montana shares the Dakotas' critical concern that fair and equitable management of the river system is undermined by the Eighth Circuit's application of an erroneous reading of dicta in *ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988).

REASONS TO GRANT THE WRIT

I. RESPONDENTS HAVE RECOGNIZED THAT THE FLOOD CONTROL ACT REQUIRES ALL USES BE GIVEN EQUAL PRIORITY.

In its decision below, the court laid the foundation for intensified management conflict among the Basin States by misreading the 1944 Flood Control Act, based on a two-sentence dictum in *ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988). (Pet. App. at 15.) Moreover, the decision below misapplies the 1944 Flood Control Act and ignores the equal priority of uses that the Corps itself, as long ago as 1991, acknowledged it must make.

In earlier litigation over management of the Missouri River, the Upper Basin states filed suit in the United States District Court in the District of Montana, *State of South Dakota, et al. v. Needham*, Civ. 91-26-JDS-BLG, Order at 3. (D. Mont. Feb. 4, 1991.) Although the District Court dismissed the matter without prejudice, it did so after concluding, "the Corps has agreed to give all water uses equal consideration while the Master Manual review is undergoing a revision" and the court further stated that "plaintiffs have obtained an acknowledgement by defendants that all current Missouri River water uses will receive equal consideration during review of the Master Manual.

Moreover, there is a reasonable expectation that the Corps' revised plan will reflect contemporary uses and needs of the Missouri River Basin." *Id.* Order at 3. The United States District Court stated, "all uses are to receive equal consideration." *Id.* at 4.

Furthermore, in granting navigation a priority as a matter of law, the court below reached a conclusion at odds with the government's previously articulated position that recognized the Corps' discretion to balance interests in the river operation plan. The United States argued, "There is no statement in the Act . . . or in *ETSI* that navigation is always entitled to priority over the other needs of the river for fish and wildlife." (Sept. 2002 Consol. Reply Br. of United States, Defendants-Appellants at 10; Pet. at 23.)

The court below largely ignored what Petitioners appropriately argue: that the 1944 Flood Control Act provides for the balancing of the various services the river system provides. (Pet. at 3.) In support, the Petitioners state that navigation is but one of the uses for the recommended "multiple-purpose" facilities, and that the reservoir plan was to provide for the "most efficient" uses of the river "for all purposes, including irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation." Pick Plan H.R. Doc. No. 78-475, 26-30 (1944).

The court below nevertheless included in its discussion of the Corps' management responsibilities language that is contrary to the "balanced uses" analysis

that the Corps recognizes it must apply. Instead, the court below extracted from the *ETSI* dictum a priority for navigation over other uses of the river.

The question of priorities under the 1944 Flood Control Act has been studied. For example, the United States General Accounting Office in 1992 found that there is "no appropriate basis" to view recreation as a secondary purpose and that recreation is not a use that should "receive only the water left over after other uses are satisfied." GAO, Water Resources: Corps' Management of the Ongoing Drought in the Missouri River Basin, No. 92-4 at 5 (Jan. 1992).

The final EIS for the 2004 Master Manual recognized Congress had not defined any "standard of any kind for management of the recommended purposes" other than the river system's broad purposes, among them "being flood control, irrigation, navigation, power, fish and wildlife, and recreation." 2004 Master Manual § 7-03. (Pet. App. at 16 and n.7.) The Corps' analysis in the EIS concludes that in the Flood Control Act, "Congress did not assign a priority to these purposes" of "flood control, navigation, irrigation, hydropower, . . . recreation, and fish and wildlife. . . ." *Id.*

Under the court's analysis, the Corps will likely misapply the necessary balancing test recognized both by the GAO in 1992, and in the Corps' most recent management document--the 2004 Master Manual. Where the Master Manual is relied upon, and

particularly where it is binding as determined by the Eighth Circuit Court in *Ubbelohde*, the Corps must be free to manage the river system with equal respect and consideration of all uses of the water, as the Act requires.

Without the Court's review, the Corps of Engineers may be required to apply a priority standard contrary to the Flood Control Act of 1944, especially in critical and recurrent drought years.

II. THIS COURT SHOULD INTERVENE TO PROTECT THE RIGHTS OF THE SMALLER UPSTREAM STATES.

If the decision below is left undisturbed, the management of the river reservoirs may be subject to changing political demands for the water inconsistent with both the Flood Control Act and the 2004 Master Manual. The Army Corps of Engineers is no different from any other administrative entity dependent upon Congressional funding authorization for its operation. In river management funding decisions, Congressional weight is greatest among the Lower Basin states, most particularly from Missouri with its nine representatives in Congress, in contrast to a single representative each for the three upstream states of Montana, North Dakota and South Dakota.

If left to p[illegible]l winds, the river uses of the Lower Basin state[illegible] particularly navigation, will trump the three Upper Basin states every time. The magnitude